No. 3969

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

NEW JERSEY INSURANCE COMPANY (a corporation),

Plaintiff in Error,

vs.

C. W. YOUNG,

Defendant in Error.

BRIEF FOR PLAINTIFF IN ERROR.

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MC KEE PTG. CO., BUTTE

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STATEMENT OF THE CASE.

This case is here on a writ of error to the United States District Court for the District of Montana, sued out by New Jersey Insurance Company, a corporation, defendant below, plaintiff in error here, to reverse a judgment rendered against it in favor of C. W. Young, plaintiff below, defendant in error here, be-

cause of certain errors set forth in the Assignment of Errors.

The suit was brought by C. W. Young, against the New Jersey Insurance Company, on a policy of insurance to recover for damage done to an automobile designated as "Marmon" "Type B" "4 passenger" "factory No. 4220048," "Motor No. 6983," described in said policy.

The right to recover is asserted under the collision clause attached to the policy. There was an award made by appraisers and the amount of loss sustained by assured determined thereby. There was a non-waiver agreement entered into between insured and insurer.

The case was tried to the court (a trial by jury having been expressly waived in the manner required by the statutes of the United States), on an agreed statement of facts.

The court handed down its decision in favor of Young against this Company and ordered judgment in favor of Young and against this Company, and judgment was duly given, made and entered in accordance therewith.

To reverse said judgment plaintiff in error has sued out the writ of error herein.

Young in his complaint alleges that on the 3rd day of July, 1921, in consideration of a specified premium paid, the insurance company made and delivered to him its policy of insurance, a copy of which is annexed to the complaint; and thereby insured him in the sum named and "against damage to the said automobile

or equipment in excess of one hundred dollars, by being in accidental collision during the period insured with any other automobile, vehicle or object."

He then goes on to allege: "That on the 18th day of July, 1921, while said insurance policy was in full force and effect and the automobile therein described was being operated by plaintiff upon the public highway in Hill County, Montana, the said automobile was completely wrecked, damaged and destroyed, by the front axle of said automobile coming and being in accidental collision with the surface of the road, upon which plaintiff was at said time driving, whereby said automobile was overturned and wrecked and its value thereby impaired and destroyed."

The collision clause in the policy upon which Young relies for his recovery reads as follows:

> "In consideration of an additional premium of $50.00 this policy also covers subject to its other conditions, damage to the automobile and/or equipment herein described in excess of $100 (each accident being deemed a separate claim and said sum to be deducted from the amount of each claim when determined) by being in accidental collision during the period insured with any other automobile, vehicle or object."

In the answer filed by the Insurance Company to the complaint of the plaintiff, said Company in its first affirmative defense specifically sets forth that part of the collision clause in the policy above quoted, and alleges as follows:

"That on or about the 18th day of July, 1921, at the time mentioned and specified in the complaint of the plaintiff on file herein, the said automobile of said plaintiff, while being operated by plaintiff upon the public highway in Hill County, Montana, was wrecked and damaged in the manner following, to wit, and not otherwise: The front axle of said automobile for some reason unknown to the defendant, broke and by reason thereof, the said automobile was overturned, and the injury and damage to the same occasioned, and produced by reason of the said breaking of said axle and the overturning of said automobile; that the said automobile did not come into accidental collision or otherwise with the surface of the road upon which the same was at said time being driven until by reason of breaking of said front axle said car was overturned and wrecked. That the breaking of said axle was the direct and proximate cause of damage and injury to said car; that there was no collision with any other automobile, vehicle or object, and that the loss and damage to the said automobile was caused by reason of the said breaking of the said front axle of same and not otherwise.

"That the fact that said front axle of said automobile broke and caused said automobile to be overturned and wrecked was not within the terms of the policy of insurance above quoted and was not an accidental collision within the terms and meaning of the risks insured against in said policy and that by reason thereof the said plaintiff has no grounds for the relief sought to be recovered in this action against said defendant."

Young in his reply to the affirmative matter above quoted in the answer of the Company, denies the same and takes issue thereon.

When the case was called for trial it was submitted to the Court upon the following agreed statement of facts:

> "It is hereby agreed by and between the parties to the above-entitled action that the accident occurred in the following manner, to wit:
>
> "That while plaintiff was driving the said automobile upon the public highway at the rate of approximately thirty miles per hour, and was crossing a coulee, that the front axle of the car broke and thereupon the broken axle and frame of the car was let down to the earth and plowed into the earth with great force and violence; that the force and resistance with which the automobile thus met was sufficient to cause the same to pivot and overturn, and that the damage resulted therefrom; that the said damage was caused by the resistance and impact with which the end of the broken axle and the front end of the car met when it thus came in contact with the earth after the breaking of the axle, and that it would not have thus come in contact with the earth if the axle had not broken. It is further agreed between the parties that immediately and for some time preceding the breaking of the axle the same was defective and was cracked so as to substantially weaken the same. That this defect was unknown to the plaintiff and could not be detected by ordinary, careful observation. It is further agreed that if the damage caused as specified above is

within the risks covered by the policy, that the plaintiff shall have and recover the sum of three thousand nine hundred dollars ($3,900.00) with interest thereon from the 19th day of March, 1922, at the rate of 8 per cent per annum.

"All other defenses on the part of defendants are abandoned."

The court rendered its decision in favor of Young and against the Company and ordered judgment rendered in favor of Young and against the Company.

Two questions were presented for the decision of the court and both were decided by the court contrary to the contention of the Insurance Company. One, whether the collision clause in the policy covered the loss, that is, whether the facts admitted established that the damage was caused to the automobile or equipment by being in accidental collision during the period insured, with any other automobile, vehicle, or object, and second, whether the fact that the front axle of the automobile broke because the same was defective and was cracked so as to substantially weaken the same, and that this was the proximate cause of the accident, precluded a recovery by Young under the policy.

ASSIGNMENT OF ERRORS.

I.

The Court erred in holding that the following facts set forth and specified in the Agreed Statement of Facts, to wit:

"That while plaintiff was driving the said automobile upon the public highway at the rate of approximately thirty miles per hour and was crossing a coulee that the front axle of the car broke and thereupon the broken axle and frame of the car was let down to the earth and plowed into the earth with great force and violence; that the force and resistance with which the automobile thus met was sufficient to cause the same to pivot and overturn, and that the damage resulted therefrom, that the said damage was caused by the resistance and impact with which the end of the broken axle and the front end of the car met when it thus came in contact with the earth after the breaking of the axle, and that it would not have thus come in contact with the earth if the axle had not broken. It is further agreed between the parties that immediately and for some time preceding the breaking of the axle the same was defective and was cracked so as to substantially weaken the same. That this defect was unknown to the plaintiff and could not be detected by ordinary, careful observation. It is further agreed that if the damage caused as specified above is within the risks covered by the policy, that the plaintiff shall have and recover the sum of three thousand nine hundred

dollars ($3,900) with interest thereon from the 19th day of March, 1922, at the rate of 8 per cent per annum," constituted an accidental collision with any other automobile, vehicle or object.

II.

The court erred in holding that under the agreed statement of facts as above set forth, that damage to plaintiff's automobile caused as specified therein, was within the risks covered by the policy of insurance.

III.

The court erred in holding that under the said Agreed Statement of Facts that the direct and proximate cause of the damage to plaintiff's automobile was a collision with the surface of the roadway along which plaintiff was traveling and not the defective condition of the front axle whereby same broke and let the car down to the earth and plowed into same.

IV.

The court erred in ordering judgment for the plaintiff and against the defendant.

ARGUMENT.

THE LOSS SUSTAINED WAS NOT WITHIN THE RISKS INSURED AGAINST IN THAT THERE WAS NOT AN ACCIDENTAL COLLISION WITH "ANY OTHER AUTOMOBILE, VEHICLE OR OBJECT."

The complaint describes the manner in which the loss occurred as follows:

> "That on the 18th day of July, 1921, while said insurance policy was in full force and effect, and the automobile therein described was being operated by plaintiff upon the public highway in Hill County, Montana, the said automobile was completely wrecked, damaged and destroyed by the front axle of said automobile coming and being in accidental collision with the surface of the road upon which the plaintiff was at said time driving, whereby said automobile was overturned and wrecked and its value thereby impaired and destroyed." (Record, page 3.)

In the Agreed Statement of Facts the manner in which the accident occurred and the cause thereof is described as follows:

> "That while plaintiff was driving the said automobile upon the public highway at the rate of approximately thirty miles per hour, and was crossing a coulee, that the front axle of the car broke and thereupon the broken axle and frame of the car was let down to the earth and plowed

into the earth with great force and violence; that the force and resistance with which the automobile thus met was sufficient to cause the same to pivot and overturn and that the damage resulted therefrom that the said damage was caused by the resistance and impact with which the end of the broken axle and the front end of the car met when it thus came in contact with the earth after the breaking of the axle, and that it would not have thus come in contact with the earth if the axle had not broken. It is further agreed between the parties that immediately and for some time preceding the breaking of the axle the same was defective and was cracked so as to substantially weaken the same." (Record, pages 53-54.)

Leaving out of consideration for the time being the admitted fact that the proximate cause of the accident was the breaking of the defective axle, the question presented for consideration is whether the fact that the end of the broken axle and the front end of the car came in contact with the surface of the road along which the car was being driven, constituted an "accidental collision" with any other "object" within the meaning of the policy of insurance. In other words, was the surface of the road another "object" within the meaning of the collision clause of the policy.

The auto was moving rapidly over the road within the limits of the highway. The front axle broke from a defect therein; the end of the axle dropped to the surface of the road. There was nothing in the road in the nature of an obstruction save the surface thereof.

When the end of the axle struck the surface of the road it penetrated the same and the auto pivoted and overturned.

The language of a contract is to be construed in its popular and usual significance and this rule applies to contracts of insurance as well as other contracts.

In the case of Bell vs. American Ins. Company (Wis.), 181 N. W., 733, the Supreme Court of Wisconsin had under consideration a policy of insurance containing the exact language involved in the present case. The facts in that case as disclosed were similar to the facts in this case, in that one side of the car settled into the ground and the car tipped over. The plaintiff sought to recover damage resulting to the car by its coming into contact with the ground at the time of the upset. The sole question presented was whether under the terms of the policy this constituted a collision within the meaning of the terms thereof. The court held that the policy insuring the plaintiff against damage resulting to his automobile by "being in accidental collision" during the period insured with any other "automobile, vehicle or object" was not an obligation to indemnify plaintiff for damage to his car when, while on the highway, one side of it gradually settled into the ground and the car tipped over, striking the ground to its damage; such casualty not being a "collision" as the word is commonly understood.

The court said: "As we construe the clause quoted, it has no reference to damage caused by upsets."

In its conclusion the court says: "This requires us to determine whether the forcible contact of the auto-

mobile with the ground as a result of the upset constitutes a collision," and after quoting the Century dictionary and Webster's dictionary, the court says: "We do not speak of falling bodies as colliding with the earth. In common parlance the apple falls to the ground; it does not collide with the earth. So with all falling bodies. We speak of the descent as a fall, not a collision. In popular understanding a collision does not result, we think from the force of gravity alone. Such an application of the term lacks the support of "widespread and frequent usage."

A pursuasive reason used by the court in that case is the doctrine of "ejusdem generis," in accordance wherewith to entitle plaintiff to recover, the collision must have occurred with another "automobile, vehicle or some similar object."

The court, however, in that case referred to the case of Wettingel vs. U. S. Lloyds, 157 Wis., 433.

Quoting the doctrine in that case, in which it was held that the word "object" must be construed to be a similar object and held that the word "collision," within the meaning of the clause above quoted would include a collision with objects other than automobiles. The court, however, expressly held that the surface of the road bed was not an "object" within the meaning of that clause.

In the case of Moblad vs. Western Indemnity Company (Cal.), 200 Pac., 750, the language of the policy read as follows:

"If caused solely by collision with another object." The facts as disclosed in the case were that the driver

of said automobile to avoid striking another automobile, swerved to the outer edge of the roadway, and the said road-way gave way, causing said automobile to run down an embankment, and after leaving said roadway to overturn, and roll down the side of a mountain; that plaintiff's said automobile did not strike or collide with any other "object" upon said road way; nor did said automobile strike or collide with any object upon the said embankment or mountain side prior to the time said automobile overturned."

The sole question in that case was whether the damage was caused solely by collision with another "object" within the meaning of the clause of the policy quoted.

The court referred to the case of Bell vs. American Ins. Company (supra), and quoted with approval the language of the court in that case and in conclusion, said as follows: "In the instant case, the damage to plaintiff's car was caused proximately by its turning over on the edge of the road. Its subsequent revolutions and consequent damage were but the operation of physical laws set in motion when it turned over on the edge of the road. The proximate and only cause of the accident was not a collision, but the upsetting of the automobile."

In the case of Southern Casualty Company vs. Johnson (Ariz.), 207 Pac., 987, the language of the policy is the same as in the present case and the court held that a policy of insurance insuring an automobile against collision does not cover damage resulting from the overturning of the automobile when it ran up on

a bank along the side of the road and overturned without colliding with any "object."

In that particular case the court affirmed a judgment in favor of the plaintiff because it appeared that the automobile was overturned as the result of a collision and under such circumstances the plaintiff could recover. That does not, however, in any way affect the result in this case, for the reason that the proximate cause of the accident was not a collision within the meaning of that word as defined in the authorities given.

In the case of Stuht vs. U. S. Fidelity & Guaranty Co. (Wash.), 154 Pac., 138, the language of the policy varies somewhat from that in the present case; the language of that policy being as follows:

> "If caused solely by collision with another object, either moving or stationary (excluding, however, all loss or damage by fire from any cause whatsoever, all loss or damage caused by striking any portion of the roadbed, or by striking street or steam railway rails or ties; and all loss or damage caused by the upset of the injured automobile unless such upset is a direct result of such a collision as is covered hereby."

In reversing a judgment for plaintiff and ordering the case dismissed, the court said:

> "We have no doubt, from the plaintiff's own evidence, that this was a clear case of the car upsetting upon the brink of a precipice without any other cause. It was the duty of the trial

court, therefore, to have directed a verdict upon the first motion made by the defendant, because the policy provides that if the damage is caused by an upset of the injured automobile, unless such upset is the direct result of a collision such as is covered thereby, such damage is not insured against. There was no collision with any object shown."

In the case of Hardenburgh vs. Employer's Liability Assurance Corporation, 141 N. Y. S., 502, the language of the policy is similar to that quoted in Stuht vs. U. S. Fidelity & Guaranty Company (supra), in that case the accident is described as follows:

"The automobile which was injured was running along a road in New Jersey. In this instance the side of the road sloped from the edge of the macadam roadbed at an angle of 30 to 45 degrees into a deep ditch. At a turn in the road the machine met a horse and wagon approaching from an opposite direction. The automobile turned out of the road upon the side of the ditch, the hind wheels 'skidding' on the turn, thus throwing the rear of the machine further into the ditch than the front wheels. In attempting to regain the road the right-hand front wheel collapsed, and the automobile turned over twice, and was badly broken and seriously damaged."

The court said:

"The burden rested upon the plaintiff to prove that the damage sustained was the result of collision with some 'object, either moving or sta-

> tionary.' Proof was given of the above facts, and the court inferred that there must have been a collision. There was no evidence given of the existence of any object with which the automobile did or could have come into collision. If we are to speculate upon the causes of the injuries to the machine, the facts point more strongly to the collapse of the wheel from strain than from collision. It was shown that the earth was soft on the side of the ditch and the wheels that left the road sunk three or four inches into the earth. The spokes of the right front wheel were all broken off at the hub."

Reference is made in the decision of the court in this case to the decision of the court in the case of Harris vs. American Casualty Company (N. J.), 85 Atl., 194, which is claimed to hold a doctrine contrary to that of the Bell case. In that case by the terms of the policy, it covers loss or damage to any automobile resulting solely from collision with any "moving or stationary object" excluding however "damage resulting from collision due wholly or in part to upsets. The facts in the case were as follows:

> "The plaintiff in error was the owner of an automobile which was being driven by his chauffeur over a bridge on the highway between Atlantic City and Pleasantville. The sides of the bridge were protected by guard rails made of posts and planking. The car crashed through the rail on one side, and was precipitated into the stream below. The machine turned upside down after

> leaving the bridge, and rested in an inverted position on the bed of the stream."

The court held that the facts showed that the upset was caused by a collision and that therefore the plaintiff could recover. The court held also in that case that the word "object" would include the water of the stream and the earth beneath it; but the facts in that case have no similarity to the facts in the case before the court, and the terms of the policy are entirely different from those in the present case, and the fact that there was an actual collision with the railing of the bridge which caused the car to be upset, deprived that case of any persuasive character whatever and the case itself was entirely disregarded and disapproved in the Bell case.

The other case referred to by the court in its opinion "Universal Service Company vs. American Insurance Company (Mich.), 181 N. W., 1007, held: "That the striking of an auto truck by the falling on to it from above of the scoop of a steam-shovel with which the truck was being loaded is a collision within the meaning of the policy. There is this significant statement to be found in the opinion of the court:

> "The record does not contain a copy of the rider so we have not its specific language before us, the case having been submitted upon an agreed statement of facts in which it appears that there was 'full coverage collision' insurance."

In that case the decision of the court in the absence of any statement as to the clause in the policy sued on

and in view of the facts as disclosed, has no bearing and is not persuasive in the present case.

In the case of O'Leary vs. St. Paul F. & M. Ins. Co. (Tex. Civ. App.), 196 S. W., 575, the automobile was injured while standing in a garage by the falling of the second floor, it was held that the company was not liable upon a policy insuring against damage and loss by collision.

Under the decisions and under the definitions, the word "collision" would indicate a striking together of two objects, one of which may be stationary, but that the surface of the road along which the car is moving is an object within the meaning of the policy of insurance, is contrary to the decision of the cases above cited. No case can be found or has been found which sustains the view announced by the trial court in its decision in this case.

II.

THE PROXIMATE CAUSE OF THE ACCIDENT WAS THE BREAKING OF THE FRONT AXLE OF THE CAR THROUGH THE DEFECT THEREIN.

Referring again to the language of the complaint "the said automobile was completely wrecked, damaged and destroyed by the front axle of said automobile coming and being in "accidental collision" with the surface of the road upon which the plaintiff was at said time driving." In the agreed statement of facts it is stated that "the front axle of the car broke and thereupon the broken axle and frame of the car was let

down to the earth. That the said damage was caused by the resistance and impact with which the end of the broken axle and the front end of the car met when it thus came in contact with the earth, after the breaking of the axle, and that it would not have thus come in contact with the earth if the axle had not broken. It is further agreed between the parties that immediately and for some time preceding the breaking of the axle, the same was defective and was cracked so as to substantially weaken the same. That this defect was unknown to the plaintiff and could not be detected by ordinary careful observation."

The proximate cause therefore of the accident was the breaking of the axle, through the latent defect therein.

The language of the policy insured against "direct loss or damage caused while this policy is in force by the perils specifically insured against." (Record, page 7.)

The direct loss or damage to the car must have been caused in this instance by "accidental collision" with another object; that is the proximate cause of the loss or damage must have been the "accidental collision" with another object, but in this particular instance, according to the allegations of the complaint and the agreed statement of facts, the proximate cause was the breaking of the axle through a latent defect therein. The accident would not have occurred if the axle had not broken, the axle would not have broken if there had not been a defect therein.

In Joyce, Section 2832, the rule is stated:

> "It may be generally stated that the loss in insurance cases must be proximately caused by a peril insured against and that the contract does not contemplate an indemnity to the assured where the peril is the remote cause of loss. This general principle or rule cannot be controverted and has been repeatedly and continually asserted."

When determining whether a loss is within the terms of the policy where there is a concurrence of different causes, the efficient cause, the one that sets others in motion is the cause to which the loss is to be attributed, though the other causes may follow it and operate more immediately in producing the disaster.

In the case of Aetna Insurance Company vs. Boon, 95 U. S., 117, 24:395, the Supreme Court said as follows:

> "The question is not what cause was the nearest in time or place to the catastrophe. That is not the meaning of the maxim causa proxima, non remota spectatur. The proximate cause is the efficient cause, the one that necessarily sets the other causes in operation. The causes that are merely incidental or instruments of a superior or controlling agency are not the proximate causes and the responsible ones, though they may be nearer in time to the result. It is only when the causes are independent of each other that the nearest is, of course, to be charged with the disaster."

The court cites many authorities to sustain this definition and quoting from the case of Brady vs. Insurance Company, 11 Mich., 425, said:

> "That which is the actual cause of the loss, whether operating directly or by putting intervening agencies, the operation of which could not be reasonably avoided, in motion, by which the loss is produced, is the cause to which such loss should be attributed."

In the case of St. John vs. Insurance Company, 11 N. Y., 519, the insurance was against fire, but the policy exempted the insurers from any loss occasioned by the explosion of a steam-boiler. A fire occurred, caused by an explosion, which destroyed the insured property. The court regarding the explosion and not the fire as the predominating cause of the loss, held the insurers not liable.

In the case of Railway Company vs. Kellogg, 94 U. S. 469, 24:256, the court in discussing what is the proximate and what the remote cause of an injury, said:

> "The inquiry must therefore always be whether there was any intermediate cause, disconnected from the primary fault and self-operating which produced the injury."

In the case of Insurance Company vs. Tweed, 7 Wallace 44, 19:65, the insurance was against fire and covered certain bales of cotton in the Alabama warehouse in Mobile. The policy contained a provision that the insurers would not be liable to make good any loss or damage by fire which might happen or take place by means of any invasion, insurrection, riot or civil commotion, or any military or usurped power, explosion,

earthquake or hurricane. During the time covered by the policy an explosion took place in the Marshall warehouse situated directly across the street, which threw down the walls in the Alabama warehouse, scattered combustible materials in the street and resulted in an extensive conflagration, embracing several squares and buildings, among which the Alabama warehouse and the cotton stored in it were wholly destroyed. The only question was whether the explosion caused the fire which destroyed the cotton. In other words, was the explosion the proximate or the remote cause of the loss and in deciding the case the court said:

> "One of the most valuable of the criteria furnished us by these authorities is to ascertain whether any new cause has intervened between the fact accomplished and the alleged cause. If a new force or power has intervened of itself, sufficient to stand as the cause of the misfortune, the other must be considered as too remote. In the present case we think there is no such new cause. The explosion undoubtedly produced or set in operation the fire which burned the plaintiff's cotton. The fact that it was carried to the cotton by first burning another building supplies no new force or power which caused the burning. Nor can the accidental circumstance that the wind was blowing in a direction to favor the progress of the fire towards the warehouse be considered a new cause."

In The G. R. Booth, 171 U. S., 450; 43:234, the court said:

"The case turns upon the question whether the damage to the sugar by the sea water which entered the ship through the hole made in her side by the explosion, without her fault, was 'occasioned by the perils of the sea'; or, in other words, whether it is the explosion, or a peril of the sea, that is to be considered as the proximate cause of the damage, according to the familiar maxim, causa proxima, non remota spectatur."

The court said:

"In the case at bar, the explosion of the case of detonators, besides doing other damage, burst open the side of the ship below the water line, and the sea water rapidly flowed in through the opening made by the explosion, and injured the plaintiff's sugar. The explosion, in consequence of which, and through the hole made by which, the water immediately entered the ship must be considered as the predominant, the efficient, the proximate, the responsible cause of the damage to the sugar according to each of the tests laid down in the judgments of this court, above referred to. The damage to the sugar was an effect which proceeded inevitably, and of absolute necessity, from the explosion and must therefore be ascribed to that cause. The explosion concurred, as the efficient agent, with the water, at the instant when the water entered the ship. The inflow of the water, seeking a level by the mere force of gravitation, was not a new and independent cause, but was a necessary and instantaneous result and effect of the bursting open of the ship's side by the explosion."

In the case of Waters vs. Insurance Company, 11 Pet., 213, 9:691, the court in passing upon the question of whether a policy of insurance upon a steamboat against perils of the rivers and of fire, covered a loss of the boat by fire caused by the barratry of the master and crew, in holding that it did not, stated:

> "We have no hesitation to say that a loss by fire caused by the barratry of the master or crew is not a loss within the policy. Such a loss is properly a loss attributable to the barratry as its proximate cause, as it concurs as the efficient agent, with the element co instanti, when the injury is produced. If the master or crew should barratrously bore holes in the bottom of the vessel, and the latter should thereby be filled with water and sink, the loss would properly be deemed a loss by barratry, and not by a peril of the seas or rivers, though the flow of water should co-operate in producing the sinking."

A somewhat similar case is the case of Smith vs. Ins. Co., 6 Wheat., 176, 5: 235. The court said:

> "The loss must be occasioned by some peril insured against. The peril must act directly and not circuitously, upon the subject of the insurance. It must be an immediate peril and the loss the proper consequence of it."

In the case of Texas, etc. Ry. Company vs. Coutourie, 135 Fed., 465, the court in defining proximate cause said:

> "'Proximate' is defined as 'lying or being in immediate relation with something else,' and as

> synonymous with 'direct' or 'immediate.' 'Proximate cause: The nearest, the immediate, the direct cause; the efficient cause.' Anderson's dictionary of law, 155. The word 'direct' is defined as meaning 'free from intervening agencies or conditions; hence characterized by immediateness of relation or of action.' Standard Dictionary. And this is the meaning of a proximate cause as stated by the Supreme Court in Milwaukee & St. Paul Railway Co. vs. Kellogg, 94 U. S., 469, 24 L. Ed., 256, where the court says: 'The inquiry must therefore always be whether there was any intermediate cause, disconnected from the primary fault, and self operating, which produced the injury.' "

In the case of Hartford Steam Boiler, etc. Ins. Co. vs. Pabst Brewing Co., 201 Fed., 617, the court said:

> "Various refinements which appear in the authorities in definitions of proximate cause do not require consideration for this inquiry as the rule we refer to is well recognized as elementary and of undoubted force for definition of insurance liability, namely: When concurring causes of the damage appear, the proximate cause to which the loss is to be attributed is the dominant, the efficient one, that sets the other causes in operation, and causes which are incidental are not proximate, though they may be nearer in time and place to the loss."

In the case of Phoenix Ins. Company vs. Bridge Co., 65 Fed., 628, the court said:

> "The rule of law is well settled that, where a particular peril is insured against, in order to be entitled to indemnity the assured must show that the particular peril caused the loss. It is held that the peril which causes the loss is the one which is the predominating and efficient cause, the cause which produces the disaster without any new intervening cause, which of itself would have been sufficient to produce the result."

In the case of German Savings & Loan Society vs. Commercial, etc. Assurance Co., 187 Fed., 758, the Court of Appeals for the Ninth Circuit after reviewing the authorities and quoting from the decisions of the Supreme Court cited above, says:

> "There can scarcely be two opinions as to the result of these authorities. The cause which is efficient to produce the injury, though it may not be the nearest in point of time or space, if continuous in its operation, passing from one effect to another without cessation until it has brought about the result, is the one to which the injury must be attributed. All intervening causes which are themselves the outgrowth of the primary cause are but incidental thereto, and are not regarded as efficient to produce the injury."

It is apparent in the light of these authorities that the insurer undertook by the careful and full specification of the terms of the loss for which it stipulated indemnity could not and did not intend to indemnify the insured except for the loss occurring through the

peril specified, it did not insure nor intend to insure for loss occurring through the breaking down of the machine by reason of latent defects. The proximate cause as defined above which put in motion all of the other concurrent causes that brought about the damage to the machine was the inherent defect in the axle, which caused it to break and let the machine down upon the surface of the roadbed, and thereby caused it to be upset. Under the authorities above quoted and in view of the admitted facts in the case, the damage to the plaintiff's machine was brought about not by any peril insured against, namely "collision with another object," but as admitted by the pleadings and by the agreed statement of facts the efficient cause which set all the other activities in motion was the defective axle and the breaking thereof as the result of that defect.

As said in the case of Moblad vs. Western Indemnity Company, 200 Pac., 750:

> "In the instant case, the damage to plaintiff's car was caused proximately by its turning over on the edge of the road. Its subsequent revolutions and consequent damage were but the operation of physical laws set in motion when it turned over on the edge of the road. The proximate and only cause of the accident was not a collision, but the upsetting of the automobile."

We therefore respectfully submit that there was no collision within the terms of the policy with any other object, and that the proximate cause of the accident

and the consequent damage to the automobile was not a collision, but the breaking of the axle, through a latent defect therein, and

We respectfully ask the court that the judgment of the court below, be reversed.

Respectfully submitted,

George D. McClain

James H. Freeman

Counsel for Plaintiff in Error.